

**This Opinion is Not a  
Precedent of the TTAB**

Mailed: January 20, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*Dana-Farber Cancer Institute, Inc.*

*v.*

*Craig Richard Marquardo*

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Opposition No. 91255611

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Amanda B. Slade, John L. Welch, and Douglas R. Wolf, of Wolf,  
Greenfield & Sacks, P.C. for Opposer Dana-Farber Cancer  
Institute, Inc.

Craig R. Marquardo, pro se.<sup>1</sup>

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Before Kuhlke, Adlin, and Johnson,  
Administrative Trademark Judges.

Opinion by Johnson, Administrative Trademark Judge:

Craig R. Marquardo (“Applicant”) seeks to register the mark SCOOPERFEST (or “Applicant’s Mark”), in standard characters, on the Principal Register for “organizing community festivals featuring primarily ice cream and also providing entertainment,” in International Class 41.<sup>2</sup>

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<sup>1</sup> “The Board **strongly** advises all parties to secure the services of an attorney who is familiar with trademark law and Board procedure.” May 4, 2020 Notice of Institution, 2 TTABVUE 6.

<sup>2</sup> Application Serial No. 88562554 was filed on August 2, 2019, under Section 1(a) of the Trademark Act, 15 U.S.C § 1051(a), based upon Applicant’s claim of first use of the mark anywhere and in commerce since at least as early as February 1, 2019.

Dana-Farber Cancer Institute, Inc. (“Opposer”) has opposed<sup>3</sup> registration of Applicant’s Mark on the ground of likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based on its registered marks listed below:

- (1) Registration No. 3123624 for SCOOPER BOWL, in standard character form, for “charitable fund raising services, namely, organizing and sponsoring ice cream eating festivals to raise money for cancer treatment center operations, cancer research and cancer education and awareness,” in International Class 36;<sup>4</sup> and
- (2) Registration No. 5473567 for SCOOPER BOWL, in standard character form, for “charitable fundraising services; charitable fundraising services by means of an ice cream festival,” in International Class 36.<sup>5</sup>

Opposer also pleads common law rights in SCOOPER BOWL for “charitable fundraising services by means of organizing and sponsoring ice cream eating festivals,”<sup>6</sup> since at least as early as August 31, 1984.<sup>7</sup>

In his Answer,<sup>8</sup> Applicant admits that Opposer has priority of use<sup>9</sup> and that Opposer’s marks in the pleaded registrations are valid, existing, and owned by Opposer.<sup>10</sup> Applicant

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Citations to the record or briefs are to the publicly available documents in TTABVUE, the Board’s electronic docketing system. *See, e.g., Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). The number preceding “TTABVUE” corresponds to the docket entry number; the number(s) following “TTABVUE” refer to the page number(s) of that particular docket entry, if applicable.

<sup>3</sup> Notice of Opposition, 1 TTABVUE.

<sup>4</sup> Registration No. 3123624 (“624 Registration”), registered Aug. 1, 2006. Combined declaration under Trademark Act Sections 8 and 9, 15 U.S.C. §§ 1058 and 1059, accepted and acknowledged.

<sup>5</sup> Registration No. 5473567 (“567 Registration”), registered May 22, 2018.

<sup>6</sup> Notice of Opposition, 1 TTABVUE 5 ¶ 3.

<sup>7</sup> *Id.*

<sup>8</sup> 4 TTABVUE.

<sup>9</sup> *Id.* at 2 ¶ 1.

<sup>10</sup> *Id.*

denies the remaining salient allegations in the Notice of Opposition. In addition, Applicant pleads what we construe as the affirmative defense of acquiescence:

Immediately after it was decided that the partnership [with Opposer] was untenable, the Applicant was contacted by counsel for the Opposer, and told that they could not use the name Scooper Bowl in any form. We proposed the name change to ScooperFest, which the Opposer approved. We would argue that while a brand and mark are very different, any opposition the Opposer has to the use of the mark, could have been raised about the branding – **but was not**. They had distinctly given us approval to use the branding, and the event came and went using the branding prior to the Opposer issuing a challenge to the mark. It is merely asserting protection of their mark as opposed to any real concern about a competitive business, whereby negating the basis of any argument they could make here.<sup>11</sup>

The case is fully briefed. Opposer bears the burden of proving its Section 2(d) claim by a preponderance of the evidence. *See Jansen Enters., Inc. v. Rind*, 85 USPQ2d 1104, 1107 (TTAB 2007). Having considered the evidentiary record, the parties' arguments and applicable authorities, we find that Opposer has carried this burden. Moreover, Applicant did not introduce any evidence into the record, and he did not prove acquiescence. So for the reasons set forth below, we sustain the opposition.

### **I. The Evidentiary Record**

The record consists of the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of Applicant's involved application. Additional evidence introduced into the record is listed below.

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<sup>11</sup> *Id.* at 7 ¶12.

### **A. Opposer's Evidence**

Opposer submitted a Notice of Reliance,<sup>12</sup> introducing into the record:

1. Applicant's Responses Nos. 2-7, 12-13, 16, 19, 20, and 21 to Opposer's First Requests for Admission dated January 8, 2021.
2. Applicant's Amended Response to Request for Admission No. 16, dated January 14, 2021.

In addition, Opposer submitted the Testimony Declaration of Suzanne Fountain, Vice President of the Jimmy Fund at the Dana-Farber Cancer Institute, Inc., with exhibits attached.<sup>13</sup> Opposer also submitted current copies of the information from the Office's electronic database records showing the status and title of Opposer's pleaded registrations '624 and '567.<sup>14</sup>

### **B. Applicant's Evidence**

Applicant did not introduce any evidence into the record.

We decline to consider factual assertions or arguments, not supported by evidence, which Applicant refers to for the first time in Applicant's trial brief. TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 801.01 (2021); *Zheng Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018). *See also Hole In 1 Drinks, Inc. v. Lajitay*, 2020 USPQ2d 10020, at \*5 (TTAB 2020) ("The Board will not consider evidence and other evidentiary materials attached to the briefs unless they were properly made of record during the time assigned for taking testimony.") (citing *Syngenta Crop Prot., Inc. v. Bio-Check, LLC*, 90 USPQ2d 1112, 116 (TTAB 2009)).

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<sup>12</sup> 7 TTABVUE.

<sup>13</sup> 6 TTABVUE ("Fountain Decl.").

<sup>14</sup> Notice of Opposition, 1 TTABVUE 9-14.

## **II. The Parties and their Marks**

### **A. Opposer**

Opposer Dana-Farber Cancer Institute, Inc. is a non-profit Massachusetts corporation founded in 1947 with a mission of providing “expert, compassionate care to children and adults with cancer while advancing the understanding, diagnosis, treatment, cure, and prevention of cancer and related diseases.”<sup>15</sup> The Jimmy Fund, a philanthropic arm of Opposer, hosts Opposer’s annual SCOOPER BOWL ice cream festival.<sup>16</sup> Opposer’s first SCOOPER BOWL festival was held in Boston, Massachusetts in 1984.<sup>17</sup> Today, Opposer’s Boston SCOOPER BOWL festival “spans three days and serves more than 20 tons of ice cream and frozen yogurt, all donated by local and national vendors. More than 40,000 people attend each year.”<sup>18</sup> Opposer has also expanded its SCOOPER BOWL festival to New York City.<sup>19</sup> The proceeds of Opposer’s SCOOPER BOWL festivals and related events directly support Opposer’s mission.<sup>20</sup>

### **B. Applicant**

Applicant Craig Richard Marquardo, a Boston native now living in the Portland, Oregon area, is the owner of the Fathom Innovation Foundation, a for-profit entity that hosts “ScooperFest.”<sup>21</sup> ScooperFest, held in Portland, Oregon, in 2019, is an all you can eat ice cream festival.<sup>22</sup>

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<sup>15</sup> Fountain Decl., 6 TTABVUE 3 ¶ 5; *see also* Notice of Opposition, 1 TTABVUE 4.

<sup>16</sup> Fountain Decl., 6 TTABVUE at 3 ¶ 6, 4 ¶ 7.

<sup>17</sup> *Id.* at 4 ¶ 8.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Applicant’s Brief at Final Hearing (“Applicant’s Brief”), 9 TTABVUE 4-6.

<sup>22</sup> *Id.*

### III. Entitlement to a Statutory Cause of Action<sup>23</sup>

Entitlement to a statutory cause of action is a requirement in every inter partes case. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837, at \*3 (Fed. Cir. 2020) (citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26 (2014)). A party in the position of plaintiff may oppose registration of a mark when doing so is within its zone of interests and it has a reasonable belief in damage that is proximately caused by registration of the mark. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at \*6-7 (Fed. Cir. 2020) (holding that the test in *Lexmark* is met by demonstrating: (1) a real interest in opposing or cancelling a registration of a mark, which satisfies the zone-of-interests requirement; and (2) a reasonable belief in damage proximately caused by registration of the mark).

Here, Opposer’s pleaded and proven registrations for its SCOOPER BOWL marks<sup>24</sup> and prior common law use of its SCOOPER BOWL mark establish that it is entitled to oppose registration of Applicant’s Mark under Section 2(d) of the Trademark Act. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *Syngenta Crop Prot.*, 90 USPQ2d at 1118 (where opposer alleged likelihood of confusion, testimony that opposer uses its mark “is sufficient to support opposer’s allegations of a

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<sup>23</sup> Our decisions have previously analyzed the requirements of Sections 13 and 14 of the Trademark Act, 15 U.S.C. §§ 1063 and 1064, under the rubric of “standing.” We now refer to this inquiry as “entitlement to a statutory cause of action.” Despite the change in nomenclature, our prior decisions and those of the U.S. Court of Appeals for the Federal Circuit interpreting “standing” under Sections 13 and 14 of the Trademark Act remain applicable. *Chutter, Inc. v. Great Mgmt. Grp.*, 2021 USPQ2d 1001, at \*10 n.39 (TTAB 2021) (citing *Spanishtown Enters., Inc. v. Transcend Res., Inc.*, 2020 USPQ2d 11388, at \*2 (TTAB 2020)).

<sup>24</sup> Notice of Opposition, 1 TTABVUE 9-14.

reasonable belief that it would be damaged”).

#### **IV. Priority**

Section 2(d) of the Trademark Act permits an opposer to file an opposition on the basis of ownership of “a mark or trade name previously used in the United States ... and not abandoned.” 15 U.S.C. § 1052(d). Because Opposer established ownership and validity of its pleaded registrations,<sup>25</sup> and Applicant did not file a counterclaim to cancel the pleaded registrations, priority is not at issue with respect to the registered marks and the services identified therein. *Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1469 (TTAB 2016) (citing *King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974)).

#### **V. Likelihood of Confusion**

We base our determination of likelihood of confusion under Trademark Act Section 2(d) on an analysis of all of the probative facts in evidence that are relevant to the factors enunciated in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”) (cited in *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015)). See also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). “In discharging this duty, the thirteen *DuPont* factors ‘must be considered’ ‘when [they] are of record.’” *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162 (Fed. Cir. 2019), quoting *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997), and *DuPont*, 177 USPQ at 567. “While we have considered each factor for which we have evidence, we

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<sup>25</sup> *Id.* at 5-6, 9-14.

focus our analysis on those factors we find to be relevant.” *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015). “Each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 75 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973).

In applying the *DuPont* factors, we bear in mind the fundamental purposes underlying Trademark Act Section 2(d), which are to prevent confusion as to source and to protect registrants from damage caused by registration of confusingly similar marks. *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ 327, 331 (1985); *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 34 USPQ2d 1161, 1163 (1995); *DuPont*, 177 USPQ at 566.

Varying weights may be assigned to the various *DuPont* factors depending on the evidence presented. *See Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1260 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.”). Two key considerations are the similarities between the marks and the relatedness of the services. *See In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods.’”)).

## **A. The Services, Channels of Trade, and Classes of Purchasers**

### 1. The Services

First, we must compare the services as identified in the application and the services for which Opposer has registered its marks and established common law rights. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Houston Comput. Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). In this case, the services identified in the opposed application are “organizing community festivals featuring primarily ice cream and also providing entertainment” in International Class 41. Opposer’s services in Registration ‘624 are “charitable fund raising services, namely, organizing and sponsoring ice cream eating festivals to raise money for cancer treatment center operations, cancer research and cancer education and awareness,” and its services in Registration ‘567 are “charitable fundraising services; charitable fundraising services by means of an ice cream festival.” The services at issue overlap and are legally identical in part, to the extent that Applicant’s ice cream festivals encompass Registrant’s ice cream festivals in the form of charitable fundraisers. Such overlap is sufficient to establish a likelihood of confusion. *See Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) (a finding of likely confusion must be made with respect to at least one item in each opposed class of the application to establish likely confusion as to that class of goods).

### 2. The Channels of Trade and Classes of Purchasers

The parties’ services are legally identical in part, so we presume that they travel through the same channels of trade to the same classes of purchasers. *See In re Viterra*

*Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (identical goods are presumed to travel in same channels of trade to same class of purchasers), *cited in Zheng Cai*, 127 USPQ2d at 1801 (“With respect to similarity of the established trade channels through which the goods reach customers, the TTAB properly followed our case law and ‘presume[d] that the identical goods move in the same channels of trade and are available to the same classes of customers for such goods....”); *Am. Lebanese Syrian Assoc. Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011) (where the services were legally identical, “the marketing channels of trade and targeted classes of consumers and donors are the same”).

Applicant admits that the relevant purchasers of both parties’ services — here, “people who like to eat ice cream”<sup>26</sup> — are not limited to sophisticated consumers only.<sup>27</sup> However, Applicant also contends, without providing any supporting evidence in the record, that Scooper Bowl and ScooperFest do not have the same customers because the two events are not in the same consumer market, same media market, or same geographical area.<sup>28</sup> Applicant argues that the two events are on the opposite sides of the country, so they are not competing for the same consumers.<sup>29</sup> But where, as here, Applicant is seeking a geographically unrestricted registration, we must conduct our likelihood of confusion analysis as if the marks were in use throughout the country. *Giant Food, Inc. v. Nation’s Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 393 (Fed. Cir. 1983). Moreover, Opposer’s registrations are likewise unrestricted so we must accord them national protection.<sup>30</sup>

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<sup>26</sup> Applicant’s Brief, 9 TTABVUE 12.

<sup>27</sup> Notice of Reliance, 7 TTABVUE 7 ¶ 12.

<sup>28</sup> Applicant’s Brief, 9 TTABVUE 6-8.

<sup>29</sup> *Id.*

<sup>30</sup> Furthermore, geographic restrictions are only considered in the context of a concurrent use

Therefore, we find that the unrestricted trade channels and classes of consumers overlap, also weighing heavily in favor of a likelihood of confusion.

### **B. The Strength of Opposer's Mark**

In determining the strength of a mark, we consider both its commercial strength and its inherent, or conceptual, strength based on the nature of the mark itself. *See In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning).”); *see also Top Tobacco, L.P. v. North Atlantic Operating Co., Inc.*, 101 USPQ2d 1163, 1171-72 (TTAB 2011); *Tea Bd. of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006). Commercial, or market strength, is the extent to which the relevant public recognizes a mark as denoting a single source. *Id.* The proper standard is the mark’s “renown within a specific product market,” *id.*, and “is determined from the viewpoint of consumers of like products,” *id.* at 1735, and not from the viewpoint of the general public.

Under this *DuPont* factor, Opposer may prove that its pleaded registrations and common law mark are entitled to an expanded scope of protection by adducing evidence of “[t]he fame of the prior mark (sales, advertising, length of use).” *DuPont*, 177 USPQ at 567. When measuring likelihood of confusion, fame “varies along a spectrum from very strong to very weak.” *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017) (citation and internal citation omitted). In turn, the next *DuPont* factor allows Applicant to contract that scope of

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proceeding. Trademark Rules §§ 2.99(h) and 2.133(c), 37 C.F.R. §§ 2.99(h) and 2.133(c).

protection by offering evidence of “[t]he number and nature of similar marks in use on similar [services].” *Id.*

1. Inherent, or Conceptual, Strength of Opposer’s SCOOPER BOWL Mark

“In order to determine the conceptual strength of the [Opposer’s] mark, we evaluate its intrinsic nature, that is, where it lies along the generic-descriptive-suggestive-arbitrary (or fanciful) continuum of words.” *In re Davia*, 110 USPQ2d 1810, 1815 (TTAB 2014).

Opposer’s SCOOPER BOWL Mark, in the pleaded registrations, is inherently distinctive, as evidenced by the two registrations on the Principal Register without a claim of acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f). *Tea Bd. of India*, 80 USPQ2d at 1889. Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b), provides that a Certificate of Registration on the Principal Register shall be prima facie evidence of the validity of the registration, of Opposer’s ownership of the mark, and Opposer’s exclusive right to use the mark in connection with the services identified in the certificate.

Applicant argues that Opposer’s mark is conceptually weak. However, as noted above, there is no evidence of record on this issue, and “a brief may not be used as a vehicle for the introduction of evidence.” TBMP § 801.01.

In assessing SCOOPER BOWL on its face, it appears to be somewhat suggestive as applied to Opposer’s services. “Scoop” is a noun derived from the word “scoop.”<sup>31</sup> As a

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<sup>31</sup> MERRIAM-WEBSTER DICTIONARY (2022) (<https://www.merriam-webster.com/dictionary/scoop>) (last accessed Jan. 13, 2022). The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *Threshold.TV Inc. v. Metronome Enters. Inc.*,

noun, “scoop” is defined as “a usually hemispherical utensil for dipping food,”<sup>32</sup> such as ice cream. As a verb, “scoop” is defined as “to take out or up as if with a scoop.”<sup>33</sup> “Bowl” is defined as “a concave usually nearly hemispherical vessel: a rounded container that is usually larger than a cup.”<sup>34</sup> A purchaser of Opposer’s services could eat ice cream scooped from a container and placed in a bowl. An alternate definition of “bowl,” particularly in the context of American football, is “a postseason game between specially invited teams.”<sup>35</sup> The record does not indicate that Opposer’s marks are associated with football, but the word “bowl” is also used generally to allude to large gatherings of people; in this case, people who have gathered to consume ice cream at a charitable fundraising event.

## 2. Commercial, or Market, Strength of Opposer’s SCOOPER BOWL Mark

Commercial strength is the extent to which the relevant public recognizes a mark as denoting a single source. *Tea Bd. of India*, 80 USPQ2d at 1899. Commercial strength may be measured “by the volume of sales and advertising expenditures of the goods traveling under the mark, and by the length of time those indicia of commercial awareness have been evident.” *Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1476 (TTAB 2014). It is considered from the perspective of “the class of customers and potential customers” of the relevant services, in this case, purchasers and potential purchasers of ice cream festival services. *Palm Bay Imps., Inc. v. Veuve Cliquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1695 (Fed. Cir. 2005)

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96 USPQ2d 1031, 1038 n.14 (TTAB 2010). We take judicial notice of this definition.

<sup>32</sup> MERRIAM-WEBSTER DICTIONARY (2022) (<https://www.merriam-webster.com/dictionary/scoop>) (last accessed Jan. 13, 2022). We take judicial notice of this definition.

<sup>33</sup> *Id.* We take judicial notice of this definition.

<sup>34</sup> MERRIAM-WEBSTER DICTIONARY (2022) (<https://www.merriam-webster.com/dictionary/bowl>) (last accessed Jan. 13, 2022). We take judicial notice of this definition.

<sup>35</sup> *Id.* We take judicial notice of this definition.

(the relevant consuming public consists of the “class of customers and potential customers of a product or service, not the general public”); *see also Joseph Phelps*, 122 USPQ2d at 1734 (focusing on “the class of customers and potential customers of a product or service, and not the general public.”).

To establish the commercial strength of its mark, Opposer proffers evidence of annual promotion and advertising<sup>36</sup> expenditures for the SCOOPER BOWL mark for the years 2014 through 2019, and annual ticket sales<sup>37</sup> and revenues<sup>38</sup> for SCOOPER BOWL festivals from 2014 through 2019. Since 1984, Opposer has sold over one million tickets for its SCOOPER BOWL festivals, totaling 7.1 million dollars.<sup>39</sup> Opposer also proffers evidence of use of the SCOOPER BOWL mark in advertising from 2003 through 2019,<sup>40</sup> along with evidence of media coverage of the SCOOPER BOWL events in the past ten years.<sup>41</sup> We acknowledge that Opposer’s promotion and advertising expenditures, ticket sales, and revenues are underwhelming when compared to similar figures for a major sporting event such as the National Football League’s “Super Bowl.” But here, based on the evidence of record, we find that Opposer has achieved some commercial success and

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<sup>36</sup> “Advertising” includes social media, email, local television and radio, and local print advertising. Fountain Decl., 6 TTABVUE 5 ¶ 10. For the six year period from 2014 through 2019, total promotion and advertising expenditures were \$118,540.00, an average of \$19,756.67 per year.

<sup>37</sup> *Id.* at ¶ 11. For the six year period from 2014 through 2019, total ticket sales were 240,000, an average of 40,000 tickets per year.

<sup>38</sup> *Id.* at ¶ 9. For the six year period from 2014 through 2019, total revenues were \$3,145,329.42, an average of \$524,221.57 per year.

<sup>39</sup> *Id.* at ¶¶ 9, 11. For the 28 year period from 1984 through 2021, an average of 35,714 tickets were sold per year, amounting to yearly gross revenues of \$186,842.11.

<sup>40</sup> Fountain Decl., 6 TTABVUE 6 ¶ 12, 9-20.

<sup>41</sup> *Id.* at ¶ 13, 21-32.

media recognition for the ice cream festival charitable fundraising services offered under its SCOOPER BOWL marks.

In rebuttal, Applicant speculates that “Scooper Bowl is not a commercially strong brand.”<sup>42</sup> However, we decline to find that purchasers have become conditioned to recognize other entities using marks identical or similar to SCOOPER BOWL, inasmuch as the record contains no evidence of consumer exposure to third-party use of SCOOPER BOWL or similar marks. *Cf. Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015) (Board discounted evidence of a “fair number” of third-party uses of marks where there were no “specifics regarding the extent of sales or promotional efforts surrounding the third-party marks” and no evidence as to what impact the third-party uses had on the minds of the purchasing public). So on this record, we find that Opposer’s mark, for these particular services, is somewhat strong commercially.

As previously discussed, Opposer’s SCOOPER BOWL mark is inherently distinctive, but appears to be suggestive in connection with the services offered under the mark. Opposer has also achieved some commercial success and renown in the Boston area for its services under the SCOOPER BOWL mark. Thus, despite its somewhat suggestive nature, considering its commercial success and exposure, we find Opposer’s SCOOPER BOWL mark, as applied to “charitable fundraising services; charitable fundraising services by means of an ice cream festival,” and “charitable fund raising services, namely,

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<sup>42</sup> Applicant’s Brief, 9 TTABVUE 8. Furthermore, Applicant contends that Opposer’s SCOOPER BOWL is not a “national brand,” has a regional audience, and that there are other ice cream festivals around the country that include “scoop” or “scooper” in their names. Opposer has nationwide priority for SCOOPER BOWL for the registered services. Applicant’s arguments are unsupported and wholly without merit.

organizing and sponsoring ice cream eating festivals to raise money for cancer treatment center operations, cancer research and cancer education and awareness,” to be entitled to a slightly broader scope of protection on the spectrum of “very strong to very weak.” *Joseph Phelps*, 122 USPQ2d at 1734 (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003)); *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1059 (TTAB 2017) (“The commercial strength of Petitioner’s TAO mark outweighs any conceptual weakness” found to exist in that case). This *DuPont* factor weighs slightly in favor of a likelihood of confusion.

### **C. The Similarity or Dissimilarity of the Marks**

Next we address the *DuPont* factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation, and commercial impression. *DuPont*, 177 USPQ at 567. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *Davia*, 110 USPQ2d at 1812), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. Sept. 13, 2019); *accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (citation omitted).

In comparing the marks, we are mindful that where, as here, the services are in part identical, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the services. *Coach Servs. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700

(Fed. Cir. 1992); *Jansen Enters*, 85 USPQ2d at 1108; *Schering- Plough HealthCare Prod. Inc. v. Ing-Jing Huang*, 84 USPQ2d 1323, 1325 (TTAB 2007).

The proper focus is on the recollection of the average purchaser, who retains a general rather than specific impression of the marks. *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971); *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *Winnebago Indus., Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). Because the services at issue are ice cream festivals, the average purchaser is an ordinary consumer.

Applicant admits that the marks at issue are confusingly similar in appearance, sound, connotation, and commercial impression.<sup>43</sup> We agree that the marks are more similar than dissimilar. Although Applicant's Mark, SCOOPERFEST, is compound and Opposer's mark, SCOOPER BOWL, is two words, the presence or absence of a space between the words is an inconsequential difference that does not distinguish the marks. *See, e.g., Stockpot, Inc. v. Stock Pot Rest., Inc.*, 220 USPQ 52, 54 (TTAB 1983), *aff'd*, 737 F.2d 1576, 222 USPQ 665 (Fed. Cir. 1984) (finding STOCKPOT and STOCK POT confusingly similar); *In re Best W. Family Steak House, Inc.*, 222 USPQ 827, 827 (TTAB 1984) (BEEFMASTER and BEEF MASTER found "practically identical").

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<sup>43</sup> Notice of Reliance, 7 TTABVUE 7 ¶ 16. Applicant argues in its brief that Opposer actually uses its mark as "JIMMY FUND SCOOPER BOWL." Indeed, Opposer has proffered evidence showing some actual use of the term "JIMMY FUND SCOOPER BOWL" in its advertising and promotional material. However, there is ample evidence of use of SCOOPER BOWL as discussed in the prior section on commercial strength. Moreover, "[w]e do not consider how the parties actually use their marks in the marketplace, but rather how they appear in the registration and the application." *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1186 (TTAB 2018). In its registrations, Opposer's Mark appears as SCOOPER BOWL in standard characters, so our analysis of Opposer's Mark must focus on SCOOPER BOWL in standard characters only.

The marks are similar in appearance in that they share the element “SCOOPER,” which is positioned first in both marks, thereby being more likely to be noticed and remembered by consumers. *See In re Detroit Athletic Co.*, 128 USPQ2d 1047, 1049 (Fed. Cir. 2018) (identity of first word in marks is “particularly significant because consumers typically notice those words first”); *see also Palm Bay*, 73 USPQ2d at 1692 (finding in part similarity of VEUVE ROYALE and VEUVE CLIQUOT marks because VEUVE “remains a ‘prominent feature’ as the first word in the mark and the first word to appear on the label”); *Century 21*, 23 USPQ2d at 1700 (finding in part similarity of CENTURY 21 and CENTURY LIFE OF AMERICA because “consumers must first notice [the] identical lead word”).

Also, the marks are structured similarly: both marks contain the same number of letters and both marks are composed of three syllables; only the last syllable in each mark differs in sound. Nevertheless, there is no “correct” pronunciation of a service mark. *In re Teradata Corp.*, 223 USPQ 361, 362 (TTAB 1984) (“as we have said many times, there is no ‘correct’ pronunciation of a trademark”).

Turning to connotation, or meaning, the definitions of “bowl” and “fest” also support a finding of likely confusion. “Fest” is defined as “a gathering, event, or show having a specified focus.”<sup>44</sup> As previously discussed, “bowl,” particularly in the context of American football, is defined as “a postseason game between specially invited teams.”<sup>45</sup> While Opposer’s services are not a “postseason game,” the word BOWL in connection with

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<sup>44</sup> MERRIAM-WEBSTER DICTIONARY (2022) (<https://www.merriam-webster.com/dictionary/fest>) (last accessed Jan. 13, 2022). We take judicial notice of this definition.

<sup>45</sup>MERRIAM-WEBSTERDICTIONARY(2022)([https://www.merriam-webster.com/dictionary/bowl#othe r-words](https://www.merriam-webster.com/dictionary/bowl#othe%20r-words)) (last accessed Jan. 13, 2022). We take judicial notice of this definition.

“charitable fundraising services by means of an ice cream festival,” would evoke in the consumers mind the meaning, not only of a bowl to hold a scoop of ice cream, but also a gathering with a specified focus.

Given their similarities in sound, appearance, and meaning, overall the marks convey a similar commercial impression when used with their respective services. Accordingly, this *DuPont* factor also weighs in favor of a finding of likelihood of confusion.

#### **D. Likelihood of Confusion: Conclusion**

Opposer’s SCOOPER BOWL mark and Applicant’s SCOOPERFEST mark are similar, and are used on in part legally identical services that we presume the parties offer in overlapping channels of trade to the same classes of purchasers. Accordingly, we find that Applicant’s Mark, SCOOPERFEST, for “organizing community festivals featuring primarily ice cream and also providing entertainment” is likely to cause confusion with the registered mark, SCOOPER BOWL, for “charitable fund raising services, namely, organizing and sponsoring ice cream eating festivals to raise money for cancer treatment center operations, cancer research and cancer education and awareness” and “charitable fundraising services; charitable fundraising services by means of an ice cream festival.”

#### **VI. Applicant’s Affirmative Defense**

Applicant, a Boston native who admits that he was “aware”<sup>46</sup> of the “Scooper Bowl,” claims that he contacted Opposer Dana-Farber Cancer Institute in 2018 about exploring a possible partnership under the “Scooper Bowl brand.”<sup>47</sup> Applicant claims that he obtained permission to use the “Scooper Bowl brand” for his event, but in the spring of

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<sup>46</sup> Applicant’s Brief, 9 TTABVUE 5.

<sup>47</sup> *Id.* at 4.

2019, an attorney for Opposer contacted Applicant and told him to change the name of his event because the parties were no longer pursuing a partnership.<sup>48</sup> Applicant asserts next, without evidentiary support, that “the attorney agreed (in writing) that Dana Farber approved of a name change allowing us to be known as ScooperFest.”<sup>49</sup> Applicant then proceeded with holding his first ScooperFest, selling over 7,000 tickets.<sup>50</sup> Shortly thereafter, Applicant moved to “protect the [SCOOPERFEST] name by filing for a trademark.”<sup>51</sup> Applicant claims “ONLY THEN did we first hear of any opposition from [Opposer] about usage of the name [SCOOPERFEST].”<sup>52</sup> Applicant maintains that “we are as entitled to protect our assets (i.e. our name) as they are.”<sup>53</sup>

As to any possible prior agreement, there is no evidence of this agreement “in writing” or otherwise so we give these assertions no consideration. Moreover, in its Responses to Opposer’s First Set of Requests for Admissions, Applicant admitted that Opposer has never given Applicant permission or authorization to use or register “any trademarks comprised of or containing SCOOPERFEST or variations thereof.”<sup>54</sup>

We do not find that Opposer granted its permission to Applicant to adopt and use the SCOOPERFEST mark. Applicant first attempted to establish a partnership with Opposer for use of the SCOOPER BOWL mark. When those negotiations failed, Applicant believed that he secured permission for use of the SCOOPERFEST mark. Like many pro se parties, Applicant mistakenly believed that this “permission” constituted the right to use, and file

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<sup>48</sup> *Id.* at 4-5.

<sup>49</sup> *Id.* at 5.

<sup>50</sup> *Id.* at 6.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 11.

<sup>54</sup> Notice of Reliance, 7 TTABVUE 6 ¶¶ 6, 7.

an application to register, the SCOOPERFEST mark. Neither party has produced a written agreement supporting any version of the facts underlying Applicant's adoption and use of SCOOPERFEST. However, as previously discussed, Applicant now admits that he did not have permission to use or register the SCOOPERFEST mark. Accordingly, Applicant has failed to prove his affirmative defense of acquiescence.

We deny Applicant's affirmative defense of acquiescence.

**Decision:** The opposition is sustained on the ground of likelihood of confusion.